No. 85-1798

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
I. THE TEXAS COURTS HAVE AT ALL TIMES BEEN OPEN TO HEAR THE ARGUMENTS TEXACO PRESSES HERE AGAINST THE SUPPOSEDLY IRRATIONAL APPLICATION OF THE LIEN AND BOND PROVISIONS PENDING APPEAL	3
A. The Closed-Courts Argument	3
B. The Uncertainty Argument	5
II. THE SECOND CIRCUIT'S EXPANSION OF THE STATE ACTION CONCEPT IS UNTENABLE, AND THE INJUNCTION ENTERED BELOW IS THEREFORE INDEPENDENTLY BARRED BY § 2283	12
III. THE COURTS BELOW HAD NO POWER TO ISSUE A STAY IN AID OF THE JURISDICTION OF THE COURTS OF TEXAS OR OF THIS COURT	13
IV. THE SECOND CIRCUIT'S DUE PROCESS HOLDING REDUCES TO AN UNTENABLE CLAIM THAT IT IS IRRATIONAL TO REQUIRE *ANY* SECURITY OF A COMPANY AS SOLVENT AS TEXACO	15
CONCLUSION	20
Appendix	1a

TABLE OF AUTHORITIES

Cases PAGE

A-Cos Leasing Corp. v. Riverside Nat'l Bank, 450 S.W.2d 435 (Tex.Civ.App.—Beaumont 1970, writ ref'd n.r.e.) 4

City of Garland v. Louton, 691 S.W.2d 603 (Tex. 1985) 7

Cleveland v. Tufts, 7 S.W. 72 (Tex. 1888)..... 19

County of Washington v. Gunther, 452 U.S. 161 (1981) 20

Dillingham v. Putnam, 109 Tex 1, 14 S.W. 303 (1890).. 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)..... 15

Drake v. Trinity Universal Ins. Co., 600 S.W.2d 768 (1980) 19

Fairbanks, Morse & Co. v. Carsey, 109 S.W.2d 985 (Tex.Civ.App.—Dallas 1937, writ dism'd w.o.j.) 4

Hernandez v. Danaher, 405 F.Supp. 757 (N.D. Ill. 1975) 5

Hernandez v. Finley, 471 F.Supp. 516 (N.D. Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979)..... 5

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 11

Juidice v. Vail, 430 U.S. 327 (1977).....5, 11

LeCroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986).....8, 10

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).... 14

Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982)..... 3, 5

Moore v. Sims, 442 U.S. 415 (1979) 5, 9

PAGE

Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) (Blackmun, Circuit Justice) 14

Ohio Civil Rights Commn. v. Dayton Christian Schools, 106 S.Ct. 2718 (1986) 9

Olympia Equipment v. Western Union, 786 F.2d 794 (7th Cir. 1986) 19

Ortwein v. Schwab, 410 U.S. 656 (1973) 10

Pace v. McEwen, 604 S.W.2d 231 (Tex.Civ.App.—San Antonio 1980, no writ) 8, 14

Scurlock Oil Co. v. Smitwick, No. C-4838 (Tex. S.Ct. Nov. 26, 1986) 12

Southwestern States General Corp. v. McKenzie, 658 S.W.2d 850 (Tex.Civ.App.—Dallas 1983, writ ref'd n.r.e.) 4

Texas State Bd. of Examiners v. Lane, 349 S.W.2d 763 (Tex.Civ.App.—Ft. Worth 1961, no writ) 7

Trainor v. Hernandez, 431 U.S. 434 (1977) 5

Transamerican Leasing Co. v. Three Bears, Inc., 567 S.W.2d 799 (Tex. 1978) 4

Turcotte v. Alice National Bank, 402 S.W.2d 894 (Tex. 1966) 7

United States v. Kras, 409 U.S. 434 (1973) 10

Weaver v. Bogle, 325 S.W.2d 457 (Tex.Civ.App.—Waco 1959, no writ) 4

Constitutional Provisions

Texas Constitution, Art. I, § 13 10

Statutes

11 U.S.C. § 544 17

PAGE

11 U.S.C. § 547 17

11 U.S.C. § 548 17

28 U.S.C. § 1257 14

28 U.S.C. § 2283 13

42 U.S.C. § 1983 ..... 11, 13

Tex. Civ. Prac. & Rem. Code § 65.013 7

Tex. Govt. Code § 21.001 8

Tex. Govt. Code § 22.002 8

Tex. Govt. Code § 22.221 8

Tex. Govt. Code § 23.101 4

Tex. Govt. Code § 23.102 4

Tex. Govt. Code § 24.011 8

Rules

Tex R. Civ. P. 329b 4

Tex. R. Civ. P. 364 ..... 3, 12

Tex. R. Civ. P. 365 8

Other Authorities

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977) 10

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INTRODUCTION

Texaco's position, and the Second Circuit's judgment, depend upon four crucial propositions: (i) Pennzoil had no need for security pending appeal; (ii) Texaco would have been gratuitously and irreparably injured by operation of the Texas security provisions; (iii) the Texas courts were powerless to address these security issues; and (iv) federal intervention in this case will not affect the systemic values of comity and federalism because the holdings here apply only to unique circumstances unlikely ever to recur.

These propositions are insupportable. Texaco surreptitiously sought federal relief, without notice to Pennzoil or to the Texas courts, even before the state trial court had entered its judgment. Contrary to Texaco's flat misrepresentation that it "did not seek . . . review of Pennzoil's Judgment" (Texaco Brief

"TB" 10), the Second Circuit recognized that the relief Texaco sought and obtained, "despite [a] lip-service disclaimer, constitute[d] . . . impermissible appellate review of issues . . . already . . . adjudicated by the Texas trial court." (A19). In granting injunctive relief against the Texas security provisions, the district court—contrary to Texaco's assertions—found that Pennzoil *does* need full security. But that court reduced the bond in accord with its own assessment of what it believed Pennzoil's maximum recovery should be after it "reviewed the Texas trial and judgment on the merits." (A47).

Unwilling and unable to defend that sort of merits review here after being rebuffed by the Second Circuit, Texaco is reduced to supporting the Second Circuit's theory that *no* security is necessary because Texaco's assets would be worth enough, on liquidation, to cover the Pennzoil judgment. But once one understands that security is needed independent of the debtor's net worth at the time of the judgment, to assure a creditor's place in line and to ensure collection without burdensome additional proceedings, it becomes plain that demanding full security is entirely reasonable on these facts.

What is crucial to recognize, however, is that the entire issue of how reasonable it is to demand full security should not have been addressed by the federal courts below and need not be reached by this Court. For all of Texaco's arguments against strict application of the Texas security provisions could and should have been presented in the first instance to the Texas courts and then, if necessary, to this Court or a Circuit Justice. Texaco's elaborate (and completely misleading) exegesis of Texas law is beside the point once one recalls the bedrock proposition that *federal* law precludes deliberate bypass of a pending state proceeding unless state law *plainly barred* presentation of the relevant federal claims. Abandoning this settled principle of federalism for Texaco would produce a precedent that could not be contained on any defensible basis, and cannot be justified by any unique aspect of this case.

There is irony in Texaco's relentless appeal to the supposed equities in its favor: not even Texaco can offer a good faith

defense of its original resort to the non-existent appellate jurisdiction of the federal court in White Plains. And the defense Texaco now offers for the extraordinary reprieve it won from the federal courts below cannot withstand principled analysis.[1]

I. THE TEXAS COURTS HAVE AT ALL TIMES BEEN OPEN TO HEAR THE ARGUMENTS TEXACO PRESSES HERE AGAINST THE SUPPOSEDLY IRRATIONAL APPLICATION OF THE LIEN AND BOND PROVISIONS PENDING APPEAL.

It is settled that an issue must be presented in a pending state proceeding "unless it *plainly appears* that this course would not afford adequate protection." *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 435 (1982) (emphasis added, citations omitted). Texaco's excuse for not presenting its claims to the Texas judiciary is the assertion that this core principle of judicial federalism does not apply because Texas has closed its courts, affirmatively denying its own judiciary any role in securing and supervising money judgments pending appeal. (TB 36). This is preposterous.

A. The Closed-Courts Argument.

The centerpiece of Texaco's argument is the fact that the Texas lien and bond provisions do not *themselves* establish a specific hearing procedure to deal with the issue of post-judgment security. (TB 34-35).[2] As a matter of federal law, that is

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1. Pennzoil will not respond here to the misplaced arguments, made by Texaco's *amici*, which paint a distorted picture of the merits of the Texas tort litigation. Those arguments obviously belong in the courts of Texas, where they are currently being addressed.

2. The bond rule gives appellants *one* way to suspend a judgment but, far from instructing courts that any *other* means of staying enforcement is foreclosed, the rule *itself* directs those courts to consider whether a stay without a full bond is "otherwise provided by law." Rule 364(a). Texaco would read these words out of the rule by quoting a single, uninformative passage from the minutes of a non-binding Texas advisory committee, a body with no power to promulgate rules. (TB 42 n.87). In essence, Texaco contends that, in adding the prefatory language, the Texas Supreme Court meant to enact a nullity.

wholly immaterial. No special hearing is needed, for these provisions come into play only upon entry of a trial court judgment, and it is indisputable that, in every such instance, the trial court that entered the judgment remains available to adjudicate all related problems. For thirty days after the entry of judgment or the denial of a motion for new trial, a Texas trial court retains "plenary power" over the entire case,[3] including jurisdiction over collateral matters relating to superseding[4] or enforcing the judgment.[5] "Under the general supervisory powers over their process," Texas courts "have the power temporarily to stay execution on judgments by them rendered when necessary to accomplish the ends of justice."[6] Prompt action from the trial court is assured, since a judgment debtor pressing constitutional grounds for an unsecured stay may invoke the priority treatment guaranteed under Texas law to constitutional, injunctive and emergency claims.[7] Indeed, in this case the trial court acted upon entry of judgment to suspend the judgment against Texaco without either a bond or liens. (A127-28 ¶ 7). That stay in turn gave Texaco *fully 3-1/2 months* in which to present its case for an unsecured stay to last for the duration of the appeal.

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3. Tex.R.Civ.P. 329b(d), (e) & (g) ; *see Transamerican Leasing Co. v. Three Bears, Inc.*, 567 S.W.2d 799, 800 (Tex. 1978). The authorities Texaco cites as contrary (TB 36 n.72) deal not with the issue of the court's post-judgment jurisdiction, but with the irrelevant issue of a party's pre-judgment freedom to amend its trial pleadings.

4. *See Southwestern States General Corp. v. McKenzie*, 658 S.W.2d 850, 852 (Tex.Civ.App.— Dallas 1983, writ ref'd n.r.e.) (trial court has power to rule on alternate security to supersede a money judgment even if appellate court has already acquired jurisdiction).

5. *See A-Cos Leasing Corp. v. Riverside Nat'l Bank*, 450 S.W.2d 435, 438 (Tex.Civ.App.—Beaumont 1970, writ ref'd n.r.e.).

6. *Fairbanks, Morse & Co. v. Carsey*, 109 S.W.2d 985, 990 (Tex.Civ. App.—Dallas 1937, writ dism'd w.o.j.) (citation omitted) (staying money judgment without security); *Weaver v. Bogle*, 325 S.W.2d 457 (Tex.Civ.App.—Waco 1959, no writ) (staying money judgment beyond termination of trial court's plenary jurisdiction).

7. *See* Tex.Govt. Code §§ 23.101(a)(1) & (b), 23.102(1) & (2).

An "*opportunity* to present [one's] federal claims in the state proceedings" is all that the law requires. *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (original emphasis). That opportunity plainly existed here. All Texaco had to do was walk back into the Texas trial court—which had already arranged an unsecured stay—and present its constitutional claim. Indeed, the district court expressly found that the Texas trial "court has the power and . . . the duty to consider reduction of the bond on federal Constitutional grounds" (A104). And the Second Circuit agreed: "Texaco could mount an attack in the Texas courts on the [full security requirement], by motion and mandamus, on the ground that it is unconstitutional as applied in this case." (A10).[8]

B. The Uncertainty Argument.

Unable to show that "state procedural law barred presentation" of its federal claim, *Moore v. Sims*, 442 U.S. 415, 432 (1979); *id.* at 430 & nn.12, 13, Texaco would reverse the burden of proof established by this Court[9] by retreating to the argument that "any procedural route for making a constitutional challenge in the state courts would (at best) have had to be used in novel, unintended and wholly uncertain ways." (TB 2). With the clock of financial doom ticking, Texaco had no

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8. Texaco errs in relying on *Trainor v. Hernandez*, 431 U.S. 434 (1977). (TB 25 n.46, 34-35). There, it made sense to look exclusively to the procedures available in the statutory attachment proceeding itself—and not to the plenary jurisdiction of the trial court—since Illinois had bifurcated the debt collection process: a creditor could automatically obtain a writ of attachment in an independent statutory proceeding *before even filing his complaint against the debtor. Hernandez v. Danaher*, 405 F.Supp. 757, 761 (N.D.Ill. 1975). Once a writ of attachment issued, Illinois law spelled out particular ways in which the debtor could challenge the writ. Those special procedures barred the interposition of federal constitutional challenges. *Hernandez v. Finley*, 471 F.Supp. 516, 519-520 (N.D.Ill. 1978), *summarily aff'd sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979).

9. *See Middlesex Ethics Comm. v. Garden State Bar Assn., supra*, 457 U.S. at 435 ("unless it *plainly appears*" that pending state proceedings "would *not* afford adequate protection" the state defendant's federal claim must be presented there) (emphasis added).

choice but to flee to a federal haven in White Plains. That paints a dramatic picture that is both inaccurate and wholly irrelevant. State remedies might be faulted as inadequate if it is uncertain whether a federal plaintiff could even *find* a state court with jurisdiction to adjudicate his federal claim in a timely manner. But when the federal plaintiff is already a party in a state court with plenary jurisdiction, uncertainty about how that court would *respond* to a federal claim against immediate enforcement of its judgment cannot warrant federal intervention.[10] If there *were* real questions about how the courts of Texas would respond, those questions obviously should have been raised in those courts, where Texaco could have invoked both the state constitution and federal due process at any point during the 3-1/2 months that were available to Texaco before any enforcement action of any kind could occur.

The Second Circuit, the district court, and Texaco all treat this extended period as irrelevant on the remarkable ground that the financial community had already panicked in response to the verdict itself (A40, A99 ¶ 76, A106 ¶ 104); that it feared what the Texas courts might do *next* in construing or even cutting short the 3-1/2 month standstill (A10, A89-90, A97; *see* TB 5 & n.10); and that it worried about what would happen in Texas the moment that standstill *expired* (A7-8, A10, A40, A88)—with the result that only *instant* relief could rescue Texaco from financial doom. (*See* TB 33). Procedural uncertainties that could not be decisively removed "*within a matter of days or even hours*" must accordingly be deemed fatal. (TB 37; original emphasis). That is a thinly veiled plea for an immediate federal judicial takeover whenever what the district

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10. Therefore, this case bears no resemblance to cases about federal intervention in specialized tax or debt collection processes that are not part of any plenary judicial proceeding. (TB 34-35 & n.70). The affront to a state's courts, and the incentive for state court defendants to conjure uncertainties in how those courts might proceed, are far greater when such defendants are permitted to bypass courts in which they are already litigating, on the basis of alleged doubts about how those courts would treat federal challenges to their rules or procedures.

court called the "volatile and sensitive . . . emotions and attitudes" of financiers (A111) will be satisfied by nothing less. Nothing could more clearly demonstrate the danger of entertaining Texaco's kinds of "uncertainties" as grounds for bypassing a pending state proceeding.

In truth, however, there was nothing in the least novel or uncertain about the paths open to Texaco. Texas law provides a formidable array of procedures and remedies for timely adjudication of Texaco's constitutional claims, state and federal, against application of the lien and bond provisions. Among those procedures is the obvious route of simply asking the trial court to stay its judgment without security, as an exercise of its supervisory power over that judgment, in order to protect Texaco's rights. *See* pp. 4-5 and nn.3-7, *supra*.[11] But the Texas remedial array also gave Texaco the opportunity:

• to ask the Texas trial court for an injunction against enforcement of its own judgment, pursuant to the Stay of Judgment Statute, § 65.013;[12]

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11. Typical of Texaco's "uncertainties" is its claim that the Texas courts might have wielded the Declaratory Judgment Act to bar resolution of any challenge based on Texaco's rights without the formal intervention of the Texas Attorney General. (TB 36 n.72) But that statute is irrelevant on its face, since Texaco's avenue of relief is by ancillary motion or mandamus, not by an original declaratory action. And the Texas Supreme Court has specifically held that, even in declaratory actions, formal intervention by the attorney general is *not* required. *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985).

12. Tex.Civ.Prac. & Rem.Code §65.013 provides that: "An injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against and as much as will cover the costs." Texaco purports to fear that the state courts would have required it to bring a separate, original action if it "petition[ed]" for relief under this statute. (TB 42). But temporary writs of the sort authorized by § 65.013 are routinely issued by trial courts ancillary to the main cause of action when "necessary to preserve the status quo pending the final adjudication of the rights of the parties," *Turcotte v. Alice National Bank*, 402 S.W.2d 894, 896 (Tex. 1966). *See also Texas State Bd. of Examiners v. Lane*, 349 S.W.2d 763, 764 (Tex.Civ.App.—Ft.Worth 1961, no writ).

• to ask the trial court for a writ of mandamus compelling the court clerk to suspend the judgment without a full bond or liens, on the ground that application of the lien and bond provisions in this case would violate both the state "open courts" guarantee and federal due process;[13]

• to ask the Texas Court of Appeals or the Texas Supreme Court to enjoin execution of the judgment in order to preserve jurisdiction over Texaco's appeal, on the ground that, without an unsecured stay, that appeal would become "meaningless," *Pace v. McEwen*, 604 S.W.2d 231, 232-33 (Tex.Civ.App.—San Antonio 1980, no writ) (appellate courts may enjoin judgments to prevent appeals ~~from becoming~~ "meaningless" even if the appellant cannot post a supersedeas bond);[14]

• to seek reduction of the supersedeas bond from the Texas Court of Appeals, pursuant to Rule 365(b), which expressly states that its provision for review and reduction of *all* excessive bonds applies "[i]n like manner" to "any . . . bond or deposit under Rule 364."[15]

This Court need not be distracted by the far-fetched doubts Texaco says it has about where each of these procedural paths

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13. Tex.Govt. Code § 24.011. *See LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), discussed *infra* n.19.

14. Texaco wholly ignores each appellate court's broad statutory power to issue writs in aid of its own jurisdiction. *See* Tex.Govt.Code §§ 21.001(a), 22.002(a), 22.221(a). Texaco would distinguish *Pace* as limited to injunctions against the transfer of *property in satisfaction of a money judgment*. (TB 41). But that distinction lacks any basis in the *Pace* opinion's discussion of statutory power to preserve jurisdiction. In any event, the ~~injunction~~ Texaco obtained here from the federal courts, which it could have sought from the Texas courts, enjoined Pennzoil from taking liens against Texaco's *property in satisfaction of a money judgment*.

15. Texaco quotes the Second Circuit Reply Brief of the Texas Attorney General in an attempt to conjure "uncertainty" over the availability of such Rule 365 relief. (TB 40 n.81). The very next line in the Attorney General's brief states: "Once again, however, Texaco's denigration of its potential state judicial relief is based on illusion and incomplete analysis of the governing authorities. Its discussion could give a very misleading impression of Texas law." (Tex.Rep.Br. at 10).

might have led. It was in the Texas courts, where Texaco was already litigating, that any such doubts should have been tested.[16] Recall that Texaco had 3-½ months under Paragraph 7—through late March 1986—to pursue those avenues and raise any questions as to their efficacy. It is therefore ridiculous for Texaco to claim that, when it "finally moved for emergency federal relief" in early December 1985, "all state avenues [were] impeded and time [was] running out" (TB 2). How can Texaco have found these routes "impeded" without taking a single step along any of them? The Second Circuit offers no better explanation than its surmise that Texas judges would either deem the state and federal Constitutions irrelevant to the rules requiring full security (A36, A37) or would deliberately evade the issue by delaying any resolution of Texaco's challenge until their jurisdiction expired (A36). Thus federal intrusion was illegitimately predicated on fear that a state court of plenary jurisdiction might deny its authority to "construe its own statutory mandate in the light of federal constitutional principles" *Ohio Civil Rights Commn. v. Dayton Christian Schools*, 106 S.Ct. 2718, 2724 (1986), either overtly or by deliberate delay.[17]

Only such unfounded fear and suspicion can account for the melodramatic tale Texaco weaves of what might have befallen it had it dared to enter the supposed labyrinth of Texas civil procedure—where corridors lead nowhere and doors are slammed in one's face.[18] This colorful saga is the most specula-

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16. *Cf. Moore v. Sims*, 442 U.S. 415, 429-30 (1979) (*Younger* abstention creates "opportunity for . . . constructions [of state law] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests").

17. Texaco's supposed fear of dilatory behavior by the Texas judiciary rests on nothing beyond the trial court's eminently reasonable reminder to Texaco that it must comply with the civil rules and seek judicial hearing and relief by filing properly noticed motions rather than by writing letters to the court. (TB 6-7).

18. Indeed, even if the Texas courts would deem themselves "powerless to give any relief without Pennzoil's consent" (TB 5), Texaco cannot explain its premise (TB 38 n.74) that those same courts would stub-

tive form of fiction. In constructing its hypothetical maze, Texaco not only *invents* obstacles where none exist, it also studiously *ignores* the obstacle-clearing "open courts" guarantee of the Texas Constitution, Art. I, § 13, which for a century has made Texas civil practice uniquely hospitable to the very kinds of claims Texaco presses here.[19]

Indeed, such cases as *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), *supra* n.19, make plain that financial barriers to judicial access which the Fourteenth Amendment would have left intact have fallen swiftly at the mere mention of the "open courts" provision of the Texas Constitution, making resort to federal due process claims quite unnecessary.[20] *Compare LeCroy* (invalidating increase in district court filing fee even as applied to non-indigents), *with United States v. Kras*, 409 U.S. 434 (1973) (upholding bankruptcy court filing fee, even as applied to indigents), *and compare Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890) (invalidating supersedeas bond as prerequisite to appeal if appellant cannot afford it), *with Ortwein v. Schwab*, 410 U.S. 656 (1973) (upholding filing fee, as applied to indigent, as prerequisite to appellate review of welfare payment reduction).

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bornly refuse to accept the consent to more flexible security arrangements that Pennzoil in fact gave through its Fed.R.Civ.P. 62 stipulation (A129).

19. *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986) (*see* Pennzoil Brief "PB" 27 n.17), which Texaco refuses to address, is illustrative. There, a Texas trial court clerk refused to accept a civil complaint for filing until plaintiff tendered an extra $75—the newly effective increase in filing fees enacted as a hard and fast rule by the legislature. Plaintiff invoked the "open courts" guarantee to challenge the increase and sought a writ of mandamus from the trial court. *Within a week* of conducting a hearing on that challenge, the trial court judge declared the fee increase unconstitutional under the "open courts" provision and issued a writ compelling the clerk to file the complaint. *Id.* at 336-37. The Texas Supreme Court affirmed. *Id.* Texaco obviously could have used here the very avenue used so succesfully in *LeCroy*.

20. *See LeCroy*, 713 S.W.2d at 338 ("state courts [do] not hesitate[] to look to their own constitutions to protect individual rights") (relying on Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977)).

Even if one might otherwise imagine overruling such cases as *Kras* and *Ortwein* at the behest of a litigant that is anything but indigent or insolvent, it would unjustifiably denigrate the competence of the Texas judiciary to affirm Texaco's right to leapfrog the Texas courts, and to bypass the unusually generous Texas Constitution, in order that Texaco might blaze that federal trail without first exhausting state remedies.[21]

The only real uncertainty confronting Texaco was whether the Texas courts would have been *persuaded* by its argument that it is entitled to an unsecured stay of judgment. The Second Circuit voiced just that concern, suggesting that the Texas judiciary might have reached what the court below deemed the wrong conclusion by "fix[ing] security in a[n] [un]reasonable amount." (A37-38). But it is settled law that a federal court may not displace state courts because it believes they will err on the merits. Self-serving forecasts of the futility of raising federal claims in state courts cannot suffice to avoid federal abstention. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610 (1975). And surely Pennzoil, deeming Texaco's federal claim untenable, cannot be asked to predict that the Texas courts would mistakenly accept it. It follows that the *Younger* doctrine clearly required abstention even if Texaco's federal complaint were otherwise proper under § 1983. But § 1983 is in fact unavailable, as the next section shows.

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21. Texaco argues that the State of Texas, by abandoning the issue of security to the judicially unsupervised hands of a private party, has foresworn the sort of sovereign interest this Court deemed worthy of comity in *Juidice v. Vail*, 430 U.S. 327 (1977) (TB 9-10, 25, 28). As demonstrated above, there has been no such abdication of public power. The state interest in enforcing the results of trials is no less than the state interest in conducting them. In arguing that *Younger* forbids federal injunctions against state court proceedings, but permits injunctions against the process by which judgments, the product of those proceedings, are carried out, Texaco drains *Younger* of much of its meaning.

II. THE SECOND CIRCUIT'S EXPANSION OF THE STATE ACTION CONCEPT IS UNTENABLE, AND THE INJUNCTION ENTERED BELOW IS THEREFORE INDEPENDENTLY BARRED BY § 2283.

Texaco describes the Second Circuit's state action holding as limited to cases of "*unsupervised* control of *government* power to appropriate *disputed* property" (TB 21 n.39) (original emphasis). This formula may accurately describe the facts of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and this Court's other *ex parte*, pre-judgment attachment cases, but it does not apply here. In this case there has been no abdication to Pennzoil of unilateral power to dispose of Texaco's interests. The government of Texas, through its judicial branch, has resolved the dispute between Pennzoil and Texaco by means of a 4-½ month trial, resulting in an enforceable judgment that is "final for the purposes of issue and claim preclusion despite the taking of an appeal" *Scurlock Oil Co. v. Smithwick*, No. C-4838, slip op. at 10 (Tex.S.Ct. Nov. 26, 1986) (citation omitted). Pennzoil's position is simply that of a winning private litigant seeking security for the judgment it has won. If Pennzoil is a state actor on the facts of this case, then so is every state court litigant with a valid judgment to enforce.[22]

Granted, the State of Texas has given one party unilateral control over execution of the judgment pending appeal, *but that party is Texaco*, which under Rule 364 may suspend execution by posting full security. Texas law further permits Texaco to request suspension without full security. *See* Part I, *supra*. But this gives Pennzoil nothing beyond the ability under

22. Texaco concedes that, after appeals are exhausted, a private party's invocation of a state's judgment enforcement mechanisms is not state action, because it "cannot be characterized as unsupervised" and because the property in question is "no longer in dispute" (TB 21). Since Texas law makes Pennzoil's victory after full trial enforceable and claim-preclusive pending appeal, Texaco's imagined distinction between pre-appeal and post-appeal "judicial supervision" is an insupportable *ipse dixit*.

state law to *resist* Texaco's pleas for an unsecured stay. As Texaco itself concedes, "[w]here there is a process by which state courts exercise discretion . . . suing the private state court litigant will not provide a § 1983 entree into the federal courts." (TB 31).[23] But for the injunction entered below, which bars *all* resort to the Texas courts on the issue of security (*see* PB 17 n.7), that process of judicial discretion would be in operation today. Section 1983 was therefore unavailable to Texaco. And, as the next section shows, the relief awarded was unavailable to the courts that issued it.

III. THE COURTS BELOW HAD NO POWER TO ISSUE A STAY IN AID OF THE JURISDICTION OF THE COURTS OF TEXAS OR OF THIS COURT.

The original jurisdiction of the lower federal courts does not encompass the quintessentially appellate power to stay state court judgments in order to facilitate meaningful appeals in and from the state court system. Texaco's only reply is to say that what it obtained from the courts below was *not* a stay of judgment, designed to aid the jurisdiction of any appellate court, state or federal; it was an injunction against the challenged lien and bond provisions, issued to preserve the status quo and thereby to protect Texaco's right to "a meaningful appeal" (TB 47).

Texaco is playing word games. When an appellate court enjoins enforcement of a trial court judgment pending appeal, in order to preserve the status quo and thereby avert the possibility that "any opinion [it] might subsequently render as to the [challenged] judgment would be meaningless," it is

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23. Texaco strives to downplay the impact of the Second Circuit's state action holding on § 2283, noting that it could just as easily have sued state enforcement officials. (TB 21-22 & n. 40). Yet Texaco concedes that such a suit would be premature before the relevant discretion had been exercised—and barred, except on direct review, thereafter. (TB 31 n.60). Moreover, for this Court to uphold the judgment below, it would have to endorse a radical expansion of the state action concept, and *that* holding could not in the future be confined to the context of the Anti-Injunction Act.

acting "to protect its jurisdiction." *Pace v. McEwen*, 604 S.W.2d at 232-33. That is precisely what the courts below did in this case. But they have no appellate jurisdiction to protect. Nor does casting the injunction as one against the security provisions as applied to the Pennzoil judgment (TB 17) change the nature of the remedial power usurped by the courts below. The security provisions affect Texaco only insofar as they impede the stay *pendente lite* that Texaco wished to obtain without full security. To enjoin those provisions as applied is to grant the stay sought.[24]

The courts below acted in no less an appellate capacity than this Court would have if Texaco had proceeded with its due process challenge straight up through the Texas courts and sought a stay from this Court.[25] The difference is that *this Court would have required exhaustion, while the courts below did not.* And Texaco offers not a whisper to rebut the reasons Pennzoil has given (PB 39-41 & nn. 37-38) for concluding that the original jurisdiction Congress conferred on federal district

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24. Texaco's Third Cause of Action demanded relief to preserve the pre-judgment status quo so as to protect Texaco's ultimate right to seek certiorari (Reply Brief Appendix "RBA" 4a; *see* PB 36 & n.32), and its Sixth Cause of Action sought a stay of the security provisions and of the judgment itself to permit meaningful pursuit of state appeals. (RBA 7a, 8a). The Second Circuit endorsed federal interference with state proceedings as necessary to facilitate the operation of the appellate process (A14), and Texaco defends the result below on the same grounds. (TB 17 n.32, 26-27 & n.52, 49).

25. Texaco is confused if it supposes that a stay is appellate in character *only* if it entails substantive review of the merits of the underlying judgment. (*See* TB 47-48 & nn.100, 101). If Texaco were rebuffed by delays in pursuing its state judicial remedies, no such merits review would be required to support a stay by this Court, or by a Circuit Justice, ancillary to a mandatory appeal under 28 U.S.C. § 1257(2) from a decision—including "a final decision" by "delay," *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1328-29 (1975) (Blackmun, Circuit Justice)—upholding the Texas security provisions against due process attack. Yet such a stay would plainly involve exercise of an appellate function, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803) (appellate power either "revises and corrects the proceedings in a cause already instituted," or "enable[s] the court to exercise its appellate jurisdiction"). Exactly the same function was performed by the district court in this case.

courts should not be stretched, without a hint of congressional intent to produce such a remedy, into a form of civil habeas corpus without exhaustion.[26]

IV. THE SECOND CIRCUIT'S DUE PROCESS HOLDING REDUCES TO AN UNTENABLE CLAIM THAT IT IS IRRATIONAL TO REQUIRE *ANY* SECURITY OF A COMPANY AS SOLVENT AS TEXACO.

Even Texaco freely concedes that due process is not even implicated unless full security is *both* unnecessary to protect Pennzoil *and* impossible for Texaco to satisfy without incurring irreparable harm. (TB 16; *see id.* 9, 11, 12-13 & n.23, 17). Texaco's strange concept of security cannot be defended. And its notion of impossibility cannot be limited to the circumstances of this case.

Texaco purports to prove that no security is needed by alluding to a supposed lower court finding and to a supposed concession by Pennzoil. There was no such finding and no such concession. Texaco persists in disregarding what the district court actually concluded:

> This Court is concerned lest other creditors of Texaco . . . seek[ ] to perfect security interests higher than that which would be available to Pennzoil. This would be unfair to Pennzoil and it would be contrary to the public interest . . . Accordingly, the Court believes that this [stay] must be secured by assets or obligations at least equal in value to what this Court regards as the maximum

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26. Texaco's only defense for its deliberate bypass of the Texas courts is the claim that it was compelled to skip over them, because Texas supposedly closed its own courts to consideration of requests like Texaco's for an unsecured stay pending appeal. Since that supposition is baseless, *see* Part I, *supra*, Texaco is indistinguishable from any other party seeking appellate relief from a federal district court by the expedient of withholding, from the state courts in which the party is then litigating and which remain open to hear the relevant federal arguments, "the first opportunity to consider a state statute or rule in light of federal constitutional arguments." *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n.16 (1983).

> amount of compensatory damages which are likely to be awarded to Pennzoil . . .

(A77).[27] The district court thus recognized that the point of requiring even solvent judgment debtors to post security is to protect the judgment creditor's place in line vis-a-vis other creditors.[28]

Given the purpose of securing a judgment, the district court's review of the underlying adjudication in Pennzoil's favor (A62-66, A77-78) was an indispensable part of any effort to accommodate the parties' interests pending appeal: determining the optimal amount of security needed to assure a judgment creditor's deserved place in line requires evaluating the maximum amount of damages that should have been awarded, discounted by the probability that the judgment might be reversed.[29] Any such determination is inextricably intertwined with the merits of the judgment.[30]

The Second Circuit recognized this (A47-48), and upheld the injunction by substituting a new rationale -- that no security at all was required,[31] because of Pennzoil's supposed "conces-

27. This conclusion, quoted from the district court's opinion, cannot be impeached by Texaco's selective excerpts from the "Supplemental Findings of Fact," since those findings were expressly subordinated by the district court to its written opinion (A78, A79).

28. It is therefore immaterial whether the Second Circuit is correct in its assertion that there is no reason to fear that Texaco will "seek, to encumber" its assets (A47): the concern is that Texaco's numerous other creditors, not Texaco itself, will eventually be able to bump Pennzoil from its place in line if the Texas judgment is not secured. Texaco's own description of its creditors' adverse reaction to the jury's verdict (TB 5) is therefore an argument *for*, not against, full security for Pennzoil.

29. The district court evaluated the Texas judgment in just these terms, and required Texaco to post a bond of $1 billion. (A77-78). The Second Circuit quite properly ruled this evaluation to be beyond the jurisdiction of the lower federal courts (A47).

30. Pennzoil does not oppose this sort of fine-tuning—provided it is undertaken by the state judiciary as part of the appellate process.

31. Nevertheless, the Second Circuit declined to vacate the bond set by the district court, evidently because it had already been posted by Texaco. (A47-48).

sion" that Texaco's liquidation proceeds would exceed all of its liabilities, including the judgment. (A45-46).[32]

This peculiar understanding of security ignores the fact that it is routine, and neither unusual nor irrational, to deem full security necessary even when the judgment debtor's estimated net worth is more than ample to satisfy the judgment at issue. The belief that assets would probably exceed liabilities upon liquidation in no way shows security to be unnecessary. Indeed, if a creditor were entitled to security only when the debtor's debts exceeded its assets, commercial security arrangements could rarely be worked out, since the debtor in that situation would by definition be insolvent, and the supposed security interest would be voidable as a mere preference if bankruptcy soon followed. *See* 11 U.S.C. § 547(b). By the same token, if a bond were justified as security for a judgment only when a judgment debtor lacked assets sufficient to meet its obligations, few judgment debtors would find it possible to post valid bonds, since such undertakings by insolvent debtors would be suspect as either voidable preferences, *see id.* § 547(d), or fraudulent conveyances, *see id.*, §§ 544(b), 548. The criterion of need postulated by Texaco and the Second Circuit thus makes no sense.

Unsurprisingly, therefore, *no* jurisdiction, state or federal, conditions the requirement of security pending appeal on a demonstration that enforcing the judgment would overwhelm the judgment debtor's net worth. The largest corporations must routinely post bonds or other security even for the smallest judgments. This is because the purpose of security, be

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32. Texaco's own complaint stated the company's market value as considerably less than the size of the Texas judgment. (RBA 2a). The district court likewise assessed Texaco's net worth at less than the amount of the judgment. (A60-61). The only thing Pennzoil has "conceded"—its belief that those estimates are too low, and that as of last July, Texaco could satisfy this judgment without undermining its "economic viability, given its vast resources" (TB 8 n.13)—shows only that Texaco exaggerates the economic catastrophe that would befall it if it had to provide full security, not that the Pennzoil judgment need not be fully secured.

it a commercial lien or a judgment bond, is not just to deal with the rare event of a bankruptcy, but to give the creditor assurance that, regardless of subsequent economic developments, it will be able to collect its full debt automatically, without going through a cumbersome collection action, and to assure the creditor that no other creditor can perfect a prior lien—important safeguards, as the district court recognized, even when the currently estimated liquidiation value is thought to exceed all current liabilities.

A requirement of full security in this case thus cannot be deemed unnecessary, and therefore is not irrational in the sense of imposing gratuitous harm on Texaco. Accordingly, Texaco's due process argument fails on its own terms. (*See* TB 16, 17). Moreover, Texaco's insupportable approach to security imposes no meaningful limits on federal intervention. If security is unnecessary and irrational here because of the judgment debtor's solvency, then security is equally unnecessary—and requiring it would be equally unconstitutional—whenever the judgment debtor has assets estimated to exceed its aggregate debts, including the adverse judgment.

Nor does Texaco's assertion that the full security requirement is impossible to meet in this case supply a limiting principle for its due process analysis. Texaco has been unable to deny that many trial losers with assets adequate to satisfy the judgments against them may nevertheless, like Texaco, find it impossible to post a sufficient bond, especially if their assets are illiquid. (*See* PB 34). And so long as enforcement of the judgment pending appeal (or liquidation of assets in order to post the required bond) would cause those judgment debtors harm not fully reversible later, those debtors, like Texaco, could allege the destruction of their appeal rights and their consequent constitutional entitlement to an affordable stay of execution.

In any event, the economic harms that would befall Texaco if full security were demanded are neither as drastic nor as irreversible as it assumes. The district court found that Texaco's fanciful vision of its own economic apocalypse does not

comport with the reality of contemporary bankruptcy.[33] And, in dismissing fears that a full bond as security for an appeal would "catapult the corporate family into bankruptcy," Judge Easterbrook correctly observed that "there is no reason to treat bankruptcy as a bogeyman, as a fate worse than death . . . . [T]he [Second Circuit's] alarums in *Texaco, Inc. v. Pennzoil Co.*, which equated a Chapter 11 filing with the imminent dismissal of 55,000 employees and the destruction of the valuable assets of a firm[,] are unjustified. Firms in reorganization go on as before . . . ." *Olympia Equipment v. Western Union*, 786 F.2d 794, 802-03 (7th Cir. 1986) (concurring opinion).[34] Moreover, if the Texas judgment were executed pending appeal, Texaco would be "entitled, upon the reversal of the judgment, to be restored to the position [it] occupied before [it] complied with the requirements of the bond and judgment," including consequential damages, costs, and interest. *Cleveland v. Tufts*, 7 S.W. 72, 75 (Tex. 1888); *reaffirmed, Drake v. Trinity Universal Ins. Co.*, 600 S.W.2d 768, 771 (1980).

To whatever extent Texaco could not be restored to its pre-enforcement state, that risk is unavoidable whenever the security needed to protect the judgment creditor is beyond what the judgment debtor can afford. It bears repeating that Texaco has conceded that, no matter how great the irreparable harm, "the Due Process Clause comes into play when—and only when"—the infliction of that harm is wholly gratuitous because there is no need for security. (TB 16). Given the concession that the Constitution allows a state to impose the risk of interim irreversible injury on trial losers whenever necessary to secure trial winners (TB 16-17), Texaco's plea to be freed of those risks in this case founders with the defeat of its claim that no security is needed.

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33. "A number of corporations, both large and small, have recently found that Congress has created a rather pleasant and profitable harbor of refuge in the bankruptcy court." (A61).

34. Writing for the majority in *Olympia*, Judge Posner ruled that avoiding the transaction costs of a possible bankruptcy may justify accepting "alternative security to a supersedeas bond that the defendant apparently cannot post," so long as that security provides only "slightly inferior protection of the plaintiff's interest." 786 F.2d at 799.

CONCLUSION

The holdings in Texaco's favor cannot be reconciled with settled principles of federal jurisdiction or of due process. Nor can they "be treated like a restricted railroad ticket, good for this day and train only." *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (citation omitted). The judgment below should therefore be reversed.

Respectfully submitted,

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January 4, 1987

APPENDIX

Appendix

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640 (CLB)

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

AMENDED COMPLAINT

Plaintiff Texaco Inc. ("Texaco"), upon knowledge as to itself and otherwise upon information and belief, avers:

* * *

5. As set forth below, although the Constitution and laws of Texas entitle Texaco to appeal as of right from the Judgment, the Texas Rules of Civil Procedure, on their face, require Texaco to post a supersedeas bond in the amount of the entire Judgment, plus interest and costs, in order to secure a stay of execution of the Judgment pending appeal. Further, Texas law permits Pennzoil, as judgment creditor, to place liens upon Texaco's property within the State of Texas immediately upon entry of the Judgment.

6. As set forth below, application of these provisions of Texas procedural law (hereinafter the "supersedeas and lien provisions") will destroy Texaco as a going concern, thus insulating the Judgment and the *Pennzoil* rule from review in the Texas appellate courts or, if necessary, in the Supreme Court of the United States.

7. As set forth below, application of the supersedeas and lien provisions will effectively foreclose appellate review of the

Judgment and the *Pennzoil* rule and will render irremediable the unlawful effects thereof under the Commerce, Supremacy and Full Faith and Credit Clauses of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will violate Texaco's rights under 28 U.S.C. § 1257(3).

8. In Paragraph 7 of the Judgment, the Texas Court added certain provisions "to preserve the status quo of this proceeding during the pendency of this matter before this Court . . ." Texaco is currently seeking certain clarification and modification of the Judgment in respect of those provisions.

9. When the jurisdiction of the Texas Court terminates, or if the provisions of Paragraph 7 of the Judgment are earlier modified or vacated without Texaco's affirmative consent, Pennzoil will be able to take advantage of the supersedeas and lien provisions described above unless enjoined by this Court.

10. Application of the supersedeas and lien provisions will cause immediate and irreparable harm to Texaco, its shareholders, employees and creditors, including Pennzoil, and the many communities which Texaco serves. Moreover, the uncertainty as to what will happen when the provisions of Paragraph 7 of the Judgment expire or are otherwise vacated or modified threatens Texaco's present ability to obtain the financing required to run and preserve its business pending final resolution of the action. Accordingly, this Complaint seeks temporary, preliminary and permanent injunctive relief restraining defendant herein from enforcing the supersedeas and lien provisions against Texaco other than as allowed by this Court until Texaco has exhausted its rights to review on appeal or certiorari and this action has been finally resolved.

* * *

46. The Judgment entered by the Texas Court is by several orders of magnitude the largest civil judgment ever entered in the history of the United States. It substantially exceeds Texaco's market value, which was approximately $7.4 billion as of December 6, 1985. If upheld on appeal, the Judgment would eliminate all of Texaco's shareholder's equity, representing the retained earnings of the company over its 83 year history.

* * *

FIRST CAUSE OF ACTION

(Commerce Clause)

64. Texaco realleges the averments of Paragraphs 1 through 63 above as if fully set forth herein.

65. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the United States Supreme Court held that state action inhibiting initiation of interstate tender offers impermissibly burdened interstate commerce and thereby violated the Commerce Clause.

66. By deterring the making of a competing tender offer where the target and a given bidder have conducted any substantial negotiations, the Judgment and the *Pennzoil* rule place a substantial, direct, adverse and undue burden upon interstate commerce.

67. Application of the supersedeas and lien provisions to prevent appellate review of the Judgment and the *Pennzoil* rule will render this impermissible burden upon interstate commerce permanent and irremediable, in violation of the Commerce Clause.

SECOND CAUSE OF ACTION

(Supremacy Clause—Williams Act)

68. Plaintiff realleges the averments of Paragraphs 1 through 67 above as if fully set forth herein.

69. By deterring the making of competing tender offers in the manner permitted and encouraged by the Williams Act, the Judgment and the *Pennzoil* rule contravene paramount federal laws and impair and frustrate paramount federal interests in preserving competition and maximizing investment values. In addition, by deterring competing bids, the Judgment and the *Pennzoil* rule confer a substantial tactical advantage upon initial offerors over targets, in contravention of Williams Act policies favoring a "neutral" balance between target and offeror.

70. By virtue of their direct conflict with the Williams Act and its policies, the Judgment and the *Pennzoil* rule are rendered void and of no legal effect under the Supremacy Clause.

71. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule will render permanent and irremediable their conflict with and disruption of the federal regulatory scheme established by the Williams Act.

72. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule is therefore void and of no legal effect under the Williams Act and the Supremacy Clause.

THIRD CAUSE OF ACTION

(Supremacy Clause—28 U.S.C. § 1257)

73. Texaco realleges the averments of paragraphs 1 through 72 above as if fully set forth herein.

74. Under 28 U.S.C. § 1257, a party to state court litigation is entitled to seek review by the Supreme Court of the United States by writ of certiorari taken from "final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right, privilege or immunity is . . . claimed under the Constitution, . . . or statutes of . . . the United States".

75. By preventing Texaco from taking an appeal to the Texas Court of Appeals and State Supreme Court, in which review is otherwise available as of right, application of the supersedeas and lien provisions will effectively prevent Texaco from exercising its federally created right to petition for certiorari under 28 U.S.C. § 1257, thereby precluding any federal review of the Judgment and of the *Pennzoil* rule.

76. Application of the supersedeas and lien provisions is therefore void and of no effect under the Supremacy Clause.

FOURTH CAUSE OF ACTION

(Supremacy Clause—Rule 10b-13)

77. Texaco repeats and realleges the averments of paragraphs 1 through 76 as if fully set forth herein.

78. Under 15 U.S.C. § 78j(b) and Rule 10b-13 promulgated thereunder, 17 C.F.R. § 240.10b-13, Pennzoil was prohibited from making an arrangement to purchase shares of Getty Oil stock other than pursuant to Pennzoil's existing tender offer. If, as Pennzoil asserts, it entered into a binding arrangement to purchase Getty Oil stock on January 3, 1984, that arrangement violated 15 U.S.C. § 78j(b) and Rule 10b-13 and was void under 15 U.S.C. § 78cc(b).

79. The Judgment and the *Pennzoil* rule reward Pennzoil for attempting to violate and for violating basic requirements of federal law, as embodied in Rule 10b-13, designed to protect shareholders from discriminatory and unfair treatment. The Judgment and the *Pennzoil* rule thereby threaten to undermine the efficacy of federal law by encouraging, and shielding from redress, the very conduct that federal law prohibits.

80. This impermissible consequence of the Judgment and the *Pennzoil* rule increases the already improper tactical advantage that the Judgment and the *Pennzoil* rule accord initial offerors, at the expense of shareholders, in contravention of federal law and policy.

81. Application of the supersedeas and lien provisions to bar appellate review threatens immediately to impose those impermissible consequences of the Judgment and the *Pennzoil* rule and to make those consequences irremediable. Application of the supersedeas and lien provisions is, therefore, void and of no legal effect under 15 U.S.C. § 78j(b), Rule 10b-13 and the Supremacy Clause.

FIFTH CAUSE OF ACTION

(Full Faith and Credit Clause)

82. Texaco realleges the averments of paragraphs 1 through 81 above as if fully set forth herein.

83. The Full Faith and Credit Clause requires the courts of the several States to respect the fundamental interests and policies of another State when bound to apply its law and to accord to applicable substantive laws of such other state the same force and effect accorded them in that State's courts.

84. These principles operate with special force where the interests of the state whose law is to be applied have carefully fashioned the cause of action to coincide with and promote governing federal interests.

85. By inhibiting competitive bidding for corporate control, the Judgment and the *Pennzoil* rule contravene and disregard important New York laws, interests and policies, in violation of the Full Faith and Credit Clause.

86. By thus contravening and disregarding New York laws, interests and policies, the Judgment and the *Pennzoil* rule unnecessarily create a conflict between New York law and paramount federal law, subjecting New York law to preemption and invalidation, all in violation of the Full Faith and Credit Clause.

87. By contravening and disregarding New York laws, interests and policies, the Judgment and the *Pennzoil* rule threaten substantially to disrupt the open market activity in connection with tender offers which is essential to New York's economy and which its laws seek to foster, all in violation of the Full Faith and Credit Clause.

88. Application of the supersedeas and lien provisions to bar appellate and Supreme Court review of the Judgment and the *Pennzoil* rule will render this contravention and disregard of New York's interests irremediable, in violation of the Full Faith and Credit Clause.

SIXTH CAUSE OF ACTION

(Due Process Clause and Equal Protection Clause)

89. Texaco realleges the averments of Paragraphs 1 through 88 above as if fully set forth herein.

90. The Texas Constitution accords Texaco a constitutional right to an appeal within the Texas State appellate system.

91. Under long established Texas constitutional law, that right may not be irrationally or unreasonably impeded, or made subject to burdens so severe that they cannot possibly be met.

92. Once Texas establishes a right to appeal free from such improper burdens, the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to constrain Texas from unreasonably or unfairly withholding that right.

93. Application of the supersedeas and lien provisions would destroy Texaco outright. Application of those provisions would thereby impose upon Texaco's attempted exercise of its right to appeal from the Judgment a manifestly arbitrary, unreasonable and unfair burden.

94. In light of the established and protected procedural right created and maintained by Texas, application of the supersedeas and lien provisions here would violate the Due Process and Equal Protection Clauses of the United States Constitution.

SEVENTH CAUSE OF ACTION

(Due Process Clause)

95. Texaco realleges the averments of Paragraphs 1 through 94 above as fully set forth herein.

96. The Judgment and the *Pennzoil* rule are the product of fundamental procedural unfairness, based upon all the surrounding circumstances of the *Pennzoil* action.

97. Because of this fundamental unfairness, the Judgment and the *Pennzoil* rule violate the Due Process Clause.

98. Application of the supersedeas and lien provisions to bar appellate review of the Judgment and the *Pennzoil* rule will render permanent and irremediable this violation of the Due Process Clause.

WHEREFORE, Texaco prays for:

1. A temporary restraining order and a preliminary and permanent injunction enjoining Pennzoil from taking any action to enforce the Judgment entered in the *Pennzoil* action, including, without limitation, attempting to obtain any judgment lien or abstract of judgment (pursuant to Tex. Prop. Code Ann. §§ 52.001 *et seq.*, or otherwise), or initiating or commencing any proceedings or actions based upon the Judgment, pending appeal or petition for certiorari from the Judgment and final resolution of this action;

2. A temporary restraining order and a preliminary and permanent injunction enjoining Pennzoil from taking any action to change the status quo as of December 11, 1985, not only while the *Pennzoil* action is within the jurisdiction of the Texas Court as described above but also pending appeal or petition for certiorari from the Judgment and final resolution of this action;

3. A declaration that application of the supersedeas and lien provisions to Texaco in the *Pennzoil* action pending appeal or petition for certiorari from the Judgment is unconstitutional and barred by federal law;

4. Texaco's costs of suit, including reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

5. Such other and further relief as this Court deems just and proper.

Dated: December 13, 1985